UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

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| WILLIAM and CAROLYN WITTIK | : | |
| | : | |
| v. | : | CIVIL NO. 1:03CV137 |
| | : | |
| STATE FARM INSURANCE COMPANIES and EMPIRE INSURANCE COMPANY | : | |

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT
(Papers 14 and 17)

Background

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of a genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, each motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue in dispute. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The facts underlying this matter are straightforward and undisputed. On October 8, 2001, plaintiffs William and Carolyn Wittik were injured when the vehicle in which they

were riding was struck by an automobile driven by Thomas Cowgill. At the time of the accident, Cowgill's vehicle was insured by Acadia Insurance Company under a policy with a single liability limit of $300,000.

The Wittiks were driving a vehicle owned by Thrifty Rent-A-Car. When renting the vehicle, they purchased additional insurance coverage from Empire Insurance Company. The Empire policy provided uninsured/underinsured motorist (hereinafter "UM") coverage of $50,000 per person/$100,000 per accident.

In addition, the Wittiks had available coverage through two State Farm Insurance Company policies. Each State Farm policy provided UM coverage of $100,000 per person/$300,000 per accident, for a total available UM coverage through State Farm of $200,000 per person/$600,000 per accident.

Because the parties did not dispute Mr. Cowgill's liability, his insurer, Acadia, paid the Wittiks the policy limit, $150,000 to each plaintiff. The Wittiks, however, remain underinsured in the amount of $100,000 each, or $200,000 in total.

State Farm has taken the position that both it and Empire are "excess" insurers under their respective polies, and thus each must pay a pro rata share of the UM payment due the Wittiks. By contrast, Empire maintains it is the

"primary" insurer and is entitled to a full set-off of the amount paid by the Cowgill's insurer, Acadia.

To expedite resolution of the Wittiks' claims, State Farm already has paid each plaintiff $100,000 in exchange for a general release. State Farm succinctly describes the companies' remaining dispute as follows:

> State Farm . . . paid $100,000 to each Plaintiff under the following rationale. First, because the tortfeasor's liability coverage was $300,000 per accident and because State Farm's and Empire's "stacked" UM limit of coverage was $700,000 per accident, the tortfeasor was "underinsured" for purposes of UM coverage. Second, the amount payable to each Plaintiff under the State Farm and Empire UM coverages was $100,000 (computed by taking the stacked limit of coverage per person – $250,000 ($100,000 for each State Farm policy and $50,000 for the Empire policy)- and reducing it by $150,000, the amount paid by Acadia to each claimant). Third, because both State Farm and Empire were "excess" rather than "primary" in their UM coverage, the two carriers should share in the $100,000 payment, by paying proportionately in accordance with their respective limit of coverage; thus, State Farm would pay four-fifths and Empire would pay one-fifth the $100,000 payment. In other words, State Farm would pay $80,000 to each Plaintiff and Empire would pay $20,000 to each Plaintiff.

State Farm's Motion for Summary Judgment (Paper 14) at 2-3.

Accordingly, should the Court rule in State Farm's favor, the company will be entitled to $40,000 reimbursement from Empire, its pro rata share of the UM payment provided the Wittiks.

## Discussion

The legal issue presented by the parties' cross motions is whether Empire is a primary insurer or whether both Empire and State Farm are excess insurers.

As part of its "GENERAL CONDITIONS," the Empire policy provides:

> 6. OTHER INSURANCE
>
> For any covered "auto" you own, this Coverage Form provides: . . .
>
> b. Contingent liability insurance for a "rentee" or other driver designated in such a "rental agreement", but only if such "rentee" or other designated driver:
>
> (1) Has no other available insurance or self-insurance, whether primary, excess or contingent, then he or she is an "insured" but only up to the limits provided by this Coverage Form; or
>
> (2) Has other available insurance less than the limits provided by this Coverage Form, then he or she is an excess insured only for the amount by which the limits provided by this Coverage Form exceed the limits of his or her other insurance, or retained limit.

Empire Commercial Lines Policy (appended to Paper 15) at Bates Stamp p. 029.

Here, the Wittiks have two State Farm insurance policies. Under these circumstances, Section 6(b)(2)

purports to define the coverage afforded the Wittiks under the Empire policy as "contingent."

Neither insurer adequately explains how the concept of "contingent" coverage should be distinguished from "primary" or "excess" coverage. As a general matter of contractual construction, "contingent," as used in Empire's policy, is not defined and therefore should be construed as providing coverage. See, e.g., Garneau v. Curtis & Bedell, Inc., 158 Vt. 363 (1992)(ambiguity in policy language "will be resolved in favor of the insured").

In any event, to the extent Empire believes the term "contingent" renders the coverage purchased by the Wittiks inapplicable in this case, see Paper 18 at 4, that construction of the insurance contract violates Vermont public policy. In relevant part, 23 V.S.A. § 941(a) provides:

> No policy insuring against liability arising out of the ownership, maintenance or use of any motor vehicle may be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein, or supplemental thereto, for the protection of persons insured thereunder who are legally entitled to recover damages, from owners or operators of uninsured, underinsured or hit-and-run motor vehicles. . . .

As noted by Judge Holden years ago, "[t]he language of 23 V.S.A. § 941 is clear; it provides 'no policy' may be issued in this state without making provision for uninsured motorist coverage." Goodrich v. Lumbermens Mut. Cas. Co., 423 F. Supp. 838, 841 (D. Vt. 1976). The Court, therefore, cannot accept Empire's premise that the term "contingent" renders its policy inapplicable in this particular case. To do so would, in effect, sanction Empire's attempt to issue a policy which does not provide the Wittiks with statutorily mandated UM coverage. See Brunet v. American Ins. Co., 660 F. Supp. 843, 847 (D. Vt. 1987)("State Farm cannot reduce its statutorily required minimum coverage merely because it deems its coverage 'excess' rather than 'primary'.").

Empire also argues Section 6(b)(2) is inapplicable because, in this case, State Farm's coverage is "more, not less" than the $50,000/$100,000 UM limit under its policy. See Paper 18 at 3. Again, accepting such an interpretation would both nullify insurance coverage purchased by the Wittiks and permit Empire to rely upon what is effectively an anti-stacking provision. Cf. State Farm Mut. Auto Ins. Co. v. Powers, 169 Vt. 230, 238 n.2 (1999)("An excess-escape clause attempts to limit UM coverage to the amount by which its policy limit exceeds the limit of other applicable policies providing UM coverage, thereby violating

prohibitions against interpolicy anti-stacking provisions.").

Empire further argues Vermont recognizes "the common-law rule . . . that the insurance on the vehicle the injured persons were occupying at the time of the accident . . . is primary," and therefore, it does not have to pay any UM insurance to the Wittiks. See Memorandum in Support of Empire's Cross Motion (Paper 18) at 2 (citing State Farm v. Powers, 169 Vt. at 237). The applicability of that proposition to this dispute is questionable.

It is true that, in State Farm v. Powers, 169 Vt. at 236, the Vermont Supreme Court acknowledged the "generally accepted position that the insurer of a vehicle involved in a collision has primary [UM] coverage for the passengers of that vehicle, while the insurer of a passenger in that vehicle has excess coverage for that passenger."(citation and quotations omitted). That statement of general law, however, is distinguishable where, as here, language in the policy defines the purchased coverage as "contingent," not "primary." Moreover, the Vermont Supreme Court simultaneously noted it will only enforce primary/excess provisions "where the rights of the policyholder will not be adversely affected," id. (citation omitted), and in this state, courts will not enforce provisions which violate an insured's right to stack multiple policies of UM coverage.

See Monteith v. Jefferson Ins. Co. of New York, 159 Vt. 378, 385 (1992).

Finally, the Court may enforce contract provisions which allocate coverage among insurers, so long as such provisions do not violate Vermont law mandating UM coverage. See State Farm v. Powers, 169 Vt. at 235. The Wittiks' State Farm policy addresses the priority of coverage:

> If There Is Other Coverage
>
> 1. If the insured sustains bodily injury:
>
> a. as a pedestrian and other uninsured motor vehicle coverage applies; or
>
> b. while occupying your car, and your car is described on the declarations page of another policy providing uninsured motor vehicle coverage,
>
> we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all such uninsured motor vehicle coverage applicable to the accident.
>
> 2. If the insured sustains bodily injury while occupying a vehicle which is not your car, this coverage applies as excess to any uninsured motor vehicle coverage which applies to the vehicle as primary coverage.
>
> If coverage under more than one policy applies as excess, we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all uninsured motor vehicle coverage applicable as excess to the accident.

State Farm Policy (appended to Paper 23) at 14-15 (italics

omitted). Under this formula, and as explained supra at 3, State Farm is entitled to the $40,000 reimbursement it seeks from Empire.

## Conclusion

State Farm's Motion for Summary Judgment is GRANTED. Empire's Motion for Summary Judgment is DENIED. For the reasons set forth in this Ruling, judgment shall be entered in favor of State Farm and against Empire in the amount of $40,000.

SO ORDERED.

Dated at Brattleboro, Vermont, this ____ day of January, 2004.

_____
J. Garvan Murtha
United States District Judge